No. 16-1362

IN THE

Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MARK D. SCHNEIDER
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
9000 Machinists Place
Upper Marlboro, MD 20772
mschneider@iamaw.org
Telephone: (301) 967-4500

DAVID A. ROSENFELD
Counsel of Record
CAREN P. SENCER
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
drosenfeld@unioncounsel.net
csencer@unioncounsel.net
Telephone (510) 337-1001

Counsel for Amicus Curiae

Mosaic - (301) 927-3800 - Cheverly, MD

QUESTION PRESENTED

Whether service advisors at car dealerships are exempt from the FLSA's overtime-pay requirements pursuant to 29 U.S.C. § 213(b)(10)(A)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
I. STATEMENT OF THE CASE	3
II. SUMMARY OF ARGUMENT	4
III. ARGUMENT	6
A. THE NATIONAL LABOR RELATIONS BOARD IS TASKED WITH DETERMINING THE APPROPRIATE BARGAINING UNIT FOR PURPOSES OF COLLECTIVE BARGAINING, 29 U.S.C. § 159(b)	6
B. THE FUNCTION OF SERVICE ADVISORS IS CUSTOMER RELATIONS	9
1. The Primary Function of Service Advisors is a Communication Link	9
2. Service Advisors Do Not Sell or Service Automobiles	12
3. Automobile Salesmen are a Separate Appropriate Unit without Inclusion of Service Advisors	17

TABLE OF CONTENTS—Continued

Page

C. DEALERSHIPS IN THE 1960S AND EARLIER EMPLOYED MANY POSITIONS IN THE SERVICE AREA IN ADDITION TO THE TWO SPECIFIED EXEMPT POSITIONS... 18

D. EVERY SERVICE DEPARTMENT INCLUDES MANY NON-EXEMPT CLASSIFICATIONS OF EMPLOYEES..... 22

1. The Historical Additional Classifications of Service Department Employees..... 23

2. The Modern Classifications of Service Department Employees... 23

3. Historical Classifications in the Parts Department..... 29

4. Modern Classifications in the Parts Department..... 30

5. Classifications in the Body Shop.. 32

E. THE DIVERSITY OF JOB FUNCTIONS IN A DEALERSHIP SUPPORTS A LIMITED AND NARROW READING OF THE OVERTIME EXEMPTION..... 33

IV. CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES:

Academy LLC,
27-RC-8320 (2004) 25, 27

Adams Motors,
80 N.L.R.B. 1518 (1948) 21

Arbogast Buick, Pontiac, GMC Truck, Inc.,
9-RC-17854 (2003) ..... *passim*

Austin Ford, Inc.,
136 N.L.R.B. 1398 (1962) 20, 26, 29, 30

Autonation Imports of Longwood, Inc. d/b/a Courtesy Honda,
12-RC-083701 (2012) ..... *passim*

Azure Auto II, LLC,
28-RC-160737 (2015) 17, 31

B.B. Burns Co.,
85 N.L.R.B. 1025 (1949) 12, 19, 28

Big Valley Ford, Inc.,
32-RC-5370 (2005) 11, 24, 32

BMW of W. Springfield,
1-RC-21908 (2005) 11, 27

Bradley Chevrolet, Inc.,
25-RC-10146 (2002) 33

Bridgeway Oldsmobile, Inc.,
290 N.L.R.B. 824 (1988) 17

Car City, Inc.,
116 N.L.R.B. 1571 (1956) 16

TABLE OF AUTHORITIES—Continued

Page

Champion Fordland, Inc.,
4-RC-20177 (2001) 16

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 15

Clay Chevrolet, Inc.,
1-RC-21570 (2002) 24

Contemporary Cars, Inc., d/b/a Mercedes-Benz of Orlando,
12-RC-9344 (2008), *subsequent decisions*
354 N.L.R.B. No. 72 (2009) and
355 N.L.R.B. 592 (2010), *enforced*,
667 F.3d 1364 (11th Cir. 2012) ..... *passim*

Country Ford Trucks, Inc.,
32-RC-4617 (1999), *subsequent decision*
330 N.L.R.B. 328 (1999), *review denied*
229 F.3d 1184 (D.C. Cir. 2000) 28

Countryway P'ship d/b/a Crown Motors,
14-RC-12430 (2003) 12, 27, 33

Crown Motor Co. d/b/a Acura of Memphis,
26-RC-8613 (2010) ..... *passim*

Cutter Dodge, Inc.,
278 N.L.R.B. 572 (1986) 21

Dick Bullis, Inc.,
176 N.L.R.B. 158 (1969) 25, 26

Fairfield Ford,
9-RC-17713 (2002), *subsequent decision*
340 N.L.R.B. No. 9 (2003), *review denied, enforced*, 116 F. App'x 601
(6th Cir. 2004) 24, 26, 27

TABLE OF AUTHORITIES—Continued

Page

Falls Dodge, Inc.,
171 N.L.R.B. 1580 (1968) 17

Fletcher Jones Las Vegas,
300 N.L.R.B. 875 (1990) 12, 24, 25, 26

Frank Buck Motors,
4-RD-2121 (2007) 28, 31

Fuller Auto. Co.,
88 N.L.R.B. 1452 (1950) 20, 21, 23

Gregory Chevrolet, Inc.,
258 N.L.R.B. 233 (1981) 31

Hall Chevrolet,
5-RC-126386 (2014) 30, 33

Hanna Motor Co.,
94 N.L.R.B. 105 (1951) 12, 19, 23

Harrys Cadillac-Pontiac Co.,
81 N.L.R.B. 1 (1949) 29

Hayward Dodge, Inc.,
292 N.L.R.B. 434 (1989) 17

Herman M. Brown Serv. Co.,
115 N.L.R.B. 1371 (1956) 30

Howard Orloff Imports, Inc.,
13-RC-21069 (2003) 15, 16

Jackson Ford, Inc.,
7-RC-22545 (2003) 16, 24

Junction Buick Pontiac GMC-Truck,
8-RC-16059 (2000) 25, 27

TABLE OF AUTHORITIES—Continued

Page

Keldeneri Corp.,
JD(SF)-10-07 (2007) 17

Larry Faul Oldsmobile Co.,
262 N.L.R.B. 370 (1982) 17, 18, 21

Life Quality Motor Sales, Inc.,
29-RC-9173 (1999) ..... *passim*

Lionel G. Sullivan,
276 N.L.R.B. 999 (1985) 17

McRobert Motor Co.,
36-RC-6082 (2001) 10

Mercedes-Benz of Pembroke Pines,
12-RC-9290 (2008) 15, 16, 28

Merry Oldsmobile, Inc.,
287 N.L.R.B. 847 (1987) 18

Michael Stead, Inc.,
32-RC-4789 (2000) ..... *passim*

Missco, Inc.,
116 N.L.R.B. 1213 (1956) 22

N. Bay Saturn Grp., Inc. d/b/a Saturn of Marin,
20-RC-17537 (1999) 14, 24, 25

NLRB v. Action Auto., Inc.,
469 U.S. 490 (1985) 7

O.Z. Hall Motors, Inc.,
94 N.L.R.B. 1180 (1951) 23

Oliver C. Joseph, Inc.,
14-RC-12830 (2011) 24, 25

TABLE OF AUTHORITIES—Continued

Page

Parker-Robb Chevrolet, Inc.,
262 N.L.R.B. 402 (1982), *review denied on unrelated issue, Auto. Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983) 21

Payton-Wright Ford, Inc.,
16-RC-10539 (2003) 31, 32, 33, 34

Performance of Brentwood LP,
26-RC-063405 (2001) ..... *passim*

Pflueger Auto Grp., LLC,
37-RC-4120 (2005) 27, 31, 32

Phil Long European Imports, LLC,
27-RC-8071 (2000) ..... *passim*

Q&S Auto., LLC,
32-RC-5403 (2006) 26

R. James Span,
189 N.L.R.B. 219 (1971) 17

Royal Gate Dodge, Inc.,
14-RC-12420 (2003) 25, 32, 33

Rush Truck Ctrs. of Cal., Inc.,
31-RC-8102 (2002) 12

Sacramento Auto. Ass'n, Valley Motor Car Dealers Council,
193 N.L.R.B. 745 (1971) 26

Sexton Ford Sales, Inc.,
14-RC-068800 (2011) ..... *passim*

Southwick Grp.,
306 N.L.R.B. 893 (1992) 17

TABLE OF AUTHORITIES—Continued

Page

State Coll. Ford Lincoln Mercury, Inc.,
6-RC-12215 (2003) 14

Story Oldsmobile, Inc.,
140 N.L.R.B. 1049 (1963) 12, 19

Suburban Ford, Inc.,
248 N.L.R.B. 364 (1980) 17

Teague Motor Co.,
91 N.L.R.B. 1149 (1950) 20, 23

Thomas Motors of Joliet, Inc.,
13-RC-21966 (2010) 15, 17

Tinley Park J. Imports, Inc.,
13-RC-21270 (2004) 14, 16, 25

Toyota of Walnut Creek, Inc.,
256 N.L.R.B. 341 (1981) 17

Trevellyan Oldsmobile Co.,
133 N.L.R.B. 1272 (1961) 19

UAG-Stevens Creek II, Inc.,
32-RC-108320 (2013) 34

Valley Truck & Tractor Co.,
80 N.L.R.B. 444 (1948) 22

W.R. Shadoff,
154 N.L.R.B. 992 (1965) 20

Weaver-Beatty Motor Co.,
112 N.L.R.B. 60 (1955) 12, 19, 23

Wiers Int'l Trucks,
25-RC-10389 (2007), *subsequent decision*
353 N.L.R.B. 475 (2008) 16

TABLE OF AUTHORITIES—Continued

	Page
Winer Motors, Inc. 265 N.L.R.B. 1457 (1982)	17
Worthington Chevrolet, Inc., 271 N.L.R.B. 365 (1984)	29
STATE CASES	
Gonzalez v. Downtown LA Motors, LP, 215 Cal.App.4th 36 (2013)	20
Keyes Motors v. Div. of Labor Standards Enforcement, 197 Cal.App.3d 557 (1987)	11
FEDERAL STATUTES	
National Labor Relations Act, 29 U.S.C. §§ 151–169	3
29 U.S.C. § 159	3, 6
29 U.S.C. § 160	8
Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219	*passim*
29 U.S.C. § 213(b)(10)(A)	i, 2, 22, 34
STATE STATUTES	
815 Ill. Comp. Stat. 306/15	13
Alaska Stat. § 45.45.140	13
Cal. Bus. & Prof. Code § 9884.9	13
Conn. Gen. Stat. § 14-65f	13
Del. Code Ann. tit. 6, § 4904A	13

TABLE OF AUTHORITIES—Continued

	Page
Fla. Stat. § 559.905	13
Me. Rev. Stat. tit. 29-A, § 1802	13
Mich. Comp. Laws § 257.1307a	13
Mich. Comp. Laws § 257.1307e	13
Minn. Stat. § 325F.58	13
N.J. Admin. Code § 13:45A-26C.2	13
N.M. Code R. § 12.2.6.10	13
N.Y. Comp. Codes R. & Regs. tit. 15, § 82.5	13
Wash. Rev. Code § 46.71.015	13
Wash. Rev. Code § 46.71.025	13
REGULATIONS	
26 Fed. Reg. 3911 (1961)	8
79 Fed. Reg. 74,308 (2014) (codified at 29 C.F.R. pts. 101, 102, and 103)	8
OTHER AUTHORITIES	
NLRB, *An Outline of Law and Procedure in Representation Cases* (2017)	7
Robert A. Gorman & Matthew W. Finkin, *Labor Law Analysis and Advocacy* (3d ed. 2013)	7

BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ("IAM") is a labor organization of nearly 600,000 members, representing workers across the United States.[1] It represents employees in various industries including manufacturing, aerospace and shipyards. Its particular interest in this case is that it has long represented employees in service departments of automobile dealerships, going back to at least the 1940s. As of this date, IAM represents over 35,000 employees in automotive industries, mainly automobile dealerships, across the country.

IAM's primary representation of employees in automobile dealerships has been of service mechanics. Its representation, however, has also included partsmen, service advisors, parts runners, dispatchers, bodymen, lot persons and the many additional classifications who work in the varying configurations in service departments of different dealers throughout the country.

---

[1] No counsel for a party authored this *amicus* brief in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

IAM has been in the forefront of organizing employees in service departments. As a result, through its affiliated District and Local Lodges, the IAM has participated in hundreds of National Labor Relations Board (NLRB) proceedings involving unit determinations concerning mechanics, service advisors and other job classifications in service departments.

IAM's interest in this case is ensuring that service advisors whom it currently represents, as well as those whom it seeks to organize, are not exempt from overtime under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219. IAM is also concerned that any expanded reading of the exemption at 29 U.S.C. § 213(b)(10)(A) would affect the many other classifications of employees it represents and seeks to organize in service departments.

Amicus Curiae brings a specific perspective to this Court. Rather than present argument about the meaning of the Fair Labor Standards Act, we explain how the NLRB, in representation proceedings, has treated service advisors; automobile salesmen and other members of the sales department; and mechanics and other members of service departments in various dealerships over the long and rich history of reported decisions. These decisions provide an even-handed view of the work performed in service departments, how that work is divided amongst classifications, the operation of dealerships, the wages and methods of compensation for various classifications and, of particular interest, the work of service advisors. This review should assist the Court in understanding the nature of service advisor work and why it makes sense that they

are not encompassed within the exemption from overtime at issue.

I. STATEMENT OF THE CASE

Respondents brought an action under the Fair Labor Standards Act, claiming that they were entitled to overtime under federal law. This case is again before the Court without any factual record of what service advisors do in dealerships across the country. The record is limited to the bare allegations of the complaint concerning one dealership. This brief provides a broader context and exploration of the work performed by service advisors and other dealership employees.

Under the provisions of the National Labor Relations Act, 29 U.S.C. §§ 151–169, the NLRB is authorized to determine appropriate bargaining units for the purposes of collective bargaining. *See* 29 U.S.C. § 159(b).

In making these unit determinations, the NLRB has issued hundreds of decisions describing the job duties and working conditions of service advisors and other classifications employed in the service department of automobile dealers. We present analysis from these decisions in support of the Respondents' arguments that the exemption cannot reasonably apply to service advisors and that the Ninth Circuit's decision excluding service advisors from the exemption makes sense both historically at the time the amendments were made by Congress as well as reflected by the current operation of automobile dealerships.

II. SUMMARY OF ARGUMENT

Decisions of the NLRB and Directions of Elections of Regional Directors present a thorough review of job duties and working conditions of employees in automobile dealerships. Because the NLRB is required by statute to make individualized unit determinations each time a question of representation is raised, there is an extensive administrative record examining the operations in automotive service departments from 1938 through the present. Because the unions and employers party to these proceedings have sometimes taken conflicting positions regarding the particular inclusions and exclusions from proposed units, the Board's Decisions present a neutral and accurate record of the nature of the work in service departments including specifically service advisors.

These cases fully explore the job duties of service advisors over the past half century. The work of service advisors is regularly described as the communication link between customers and the mechanics who service their vehicles. Service advisors are uniformly described as having neither the skills nor tools to perform a servicing function. This undermines the argument of Petitioner that service advisors are engaged in the servicing of vehicles. Pet. Br. 25.

Review of NLRB decisions show service advisors coordinate the process of automobile repair for customers and ensure that customers are advised of the status of needed repairs and costs associated with the repairs, and all paperwork is completed properly. Any "selling" is incidental to the main function of serving as a customer liaison. This undermines the

argument of Petitioner that service advisors are salesmen. Pet. Br. 27-29.

These same decisions describe the numerous job classifications in use in service departments and the scope of their job duties. Lube technicians, lot attendants, car washers, detailers, cashiers, warranty clerks, parts drivers, parts runners, body shop employees and many other job classifications are employed in addition to mechanics and partsmen in most dealerships. These job classifications do not fit within the FLSA exemption relied upon by Petitioner, and these individuals historically and currently enjoy the overtime protections of the FLSA. This undermines the argument of Petitioner that the exemption is meant to be inclusive of all classifications of the parts and service departments engaged in the core servicing of vehicles. *See* Pet. Br. 34.

Given the variety of job classifications used in dealerships, it is evident that the exemption was not intended to include service advisors. If accepted, the Petitioner's argument regarding the functional integration of service advisors in the servicing of vehicles would result in a *de facto* return to the blanket exemption of 1961 since all employees in the service department are part of the servicing process and NLRB decisions from the 1940s forward identify a variety of service department employees as integral to the repair of a vehicle. Contrary to the Petitioner's position, it would be more disruptive to expand the exemption to include more classifications than to properly exclude one classification that neither services nor sells automobiles.

In summary, this brief addresses the job duties of service advisors and all the other employees in ser-

vice, sales, and parts departments and explains why the Ninth Circuit's limited reading of the FLSA exemption is consistent with the daily operations of automobile dealerships.

III. ARGUMENT

A. THE NATIONAL LABOR RELATIONS BOARD IS TASKED WITH DETERMINING THE APPROPRIATE BARGAINING UNIT FOR PURPOSES OF COLLECTIVE BARGAINING, 29 U.S.C. § 159(b).

Through the NLRB representation process, a wealth of administrative decisions have been issued describing the classifications, job duties, working conditions and structures of automotive dealerships. These decisions provide a neutral factual description of dealerships over time since at least the early 1940s.

Under the provisions of 29 U.S.C. § 159(b), the NLRB "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ."

The statute also establishes the procedure by which unit determinations are made: "[T]he Board shall investigate such [representation] petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice." 29 U.S.C. § 159(c)(1).

The NLRB has historically employed a community of interest standard in determining the appropriateness of any particular unit.

The leading treatise describes the Board's standard as follows:

> In making judgments about "community of interest" in these different settings, the Board will look at such factors as: (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographical proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

Robert A. Gorman & Matthew W. Finkin, *Labor Law Analysis and Advocacy* § 5.2, at 103 (3d ed. 2013). *See also NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); NLRB, *An Outline of Law and Procedure in Representation Cases* 142-45 (2017).[2]

As a result of application of this established test, nearly all unit determination decisions review each

---

[2] Available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/OutlineofLawandProcedureinRepresentationCases_2017Update.pdf.

factor as applied to the employees in each job classification.

Prior to 1961, hearings were conducted by the Regional Director and the record was submitted directly to the Board for the issuance of a decision. After 1961, decisions were issued by the Regional Directors subject to review by the Board. 26 Fed. Reg. 3911 (1961). The process has been modified recently to speed up and simplify the process but still requires a determination to be made in each case based on its unique facts. 79 Fed. Reg. 74,308 (2014) (codified at 29 C.F.R. pts. 101, 102, and 103).[3]

The Board has considered the placement of service advisors in or out of potential bargaining units sought by unions and in or out of alternative units proposed by employers. These cases provide a body of concrete facts regarding the work of service advisors, other service department employees, and sales department employees. The similarities and differences between service advisors and other employees and the general working conditions of service departments have been described in a manner that of-

---

[3] Some cited cases involve unfair labor practice proceedings, which result in a decision issued by an Administrative Law Judge. These decisions are subject to review by the NLRB if either party files exceptions. *See* 29 U.S.C. § 160. Decisions of the Board are available on the NLRB's website. The Regional Director decisions after 1961 were not published in the official volumes of NLRB Decisions, but are available through the Board's website at https://www.nlrb.gov/search/documents. Reported NLRB Decisions are available on the Board's website at https://www.nlrb.gov/cases-decisions/board-decisions in addition to Westlaw and Lexis.

fers consistency and accuracy to understand the work of service advisors.

Employers and unions in these cases have litigated the scope of bargaining units in service departments because service departments contain many different classifications and vary from dealership to dealership. In some cases, the petitioning union or the employer has sought to include service advisors in a unit of service department employees with mechanics. In other cases, either party has sought to exclude service advisors. The cases show a consistent separation between salesmen and other members of the sales department and mechanics and other members of the service department, including service advisors. The term "salesman" is consistently applied only to automobile salesmen in the sales department. Salesmen are routinely organized into appropriate units distinct from the service department, including the service advisors.

The variety of positions taken by the parties to these unit determination proceedings makes these decisions trustworthy to the issues before this Court. These conclusions are generalized from over 300 cases that concern various classifications in dealerships.

B. THE FUNCTION OF SERVICE ADVISORS IS CUSTOMER RELATIONS.

1. The Primary Function of Service Advisors is a Communication Link.

A service advisor is a customer-facing position. He or she provides customer service to people seek-

ing vehicle maintenance and repairs. The primary duties are to record customer concerns regarding their vehicle on a repair order, to provide an estimate on the cost of repairs, and to keep customers informed on the status of their vehicle's repair or maintenance.

> In most dealerships, service advisors:
>
> > greet in-coming customers, prepare repair orders, and assign the repair orders to individual [mechanics] . . . . Service advisors are required to have good communication skills and receive special training in dealing with customers. . . . The "advisor" part of their title deals with their relationship with the customer. They do not "advise" or counsel the mechanics on how to diagnose a problem, what cause to eliminate first, or other technical aspects. . . . [T]hey merely serve as the link between customers and mechanic.

McRobert Motor Co., 36-RC-6082, at p. 2 (2001).[4] The primary responsibility of a service advisor is "to greet customers, to find out what problems the customers are experiencing with their vehicles, and to keep the customers informed about the status of their vehicles during the repair process." *Phil Long European Imports, LLC*, 27-RC-8071, p. 5 (2000). *See also Autonation Imports of Longwood, Inc. d/b/a Courtesy Honda* ("*Courtesy Honda*"), 12-RC-083701, p. 5 (2012) ("a liaison"); *Performance of Brentwood LP*, 26-RC-063405, p. 24 (2011) (same); *Crown Motor Co. d/b/a Acura of Memphis* ("*Acura of Memphis*"), 26-RC-

[4] Citations to the NLRB case numbers reference the Regional Directors' Decision and Direction of Election.

8613, p. 15 (2010) (same). "[C]ustomer service is a critical aspect of the service advisor job." *Big Valley Ford, Inc.*, 32-RC-5370, p. 7 (2005). The job requires "customer-facing skills" to explain repairs that will be performed to the vehicle. *BMW of W. Springfield*, 1-RC-21908, p. 4 (2005).

The duties of the service advisor are generally to generate the necessary documentation for a service to start, commonly referred to as a "repair order," and to ascertain the estimated time and cost to complete a repair. *Arbogast Buick, Pontiac, GMC Truck, Inc.* (*"Arbogast"*), 9-RC-17854, p. 3 (2003). This could be either a mechanical malfunction or, more commonly, scheduled maintenance as recommended by the manufacturer or dealership. A mechanic diagnoses any problems with a vehicle, performs any scheduled maintenance, and conducts a multi-point inspection in order to determine if there are any additional or unidentified problems, which could generate additional potential repairs. *Performance of Brentwood*, 26-RC-063405, p. 24. Based on the findings solely of the mechanic, the service advisor contacts the customer and recommends additional servicing or repairs. *Big Valley Ford*, 32-RC-5370, pp. 12–13.[5] If the customer accepts the proposed additional work, a repair order is generated by the service advisor for the mechanic. *Courtesy Honda*, 12-RC-083701, pp. 7–8. Once the ser-

---

[5] *Keyes Motors v. Div. of Labor Standards Enforcement*, 197 Cal.App.3d 557, 564 (1987) ("[D]iagnosis and recommendation is no more 'salesmanship' than a plumber's diagnosis and recommendation that an additional pipe is needed to make a repair.")

vice is completed, the service advisor contacts the customer to advise that the vehicle is ready. *Id.* at p. 8. The completed repair order is then used to compute the billing.

Since the 1940s, the service advisor has served a customer relations role in the service department but neither services nor sells vehicles. *B.B. Burns Co.*, 85 N.L.R.B. 1025, 1027 (1949) (equating service advisor to a plant clerical position); *Hanna Motor Co.*, 94 N.L.R.B. 105, 107 (1951); *Weaver-Beatty Motor Co.*, 112 N.L.R.B. 60, 62 (1955); *Story Oldsmobile, Inc.*, 140 N.L.R.B. 1049, 1051 (1963).

2. Service Advisors Do Not Sell or Service Automobiles.

The service advisor's duties do not include mechanical work or automobile sales. Employers have argued to the NLRB that the only appropriate bargaining unit is the entirety of the service department because "employees are integrally related to the single function of servicing and repairing automobiles." *Fletcher Jones Las Vegas* ("*Fletcher Jones*"), 300 N.L.R.B. 875, 876 (1990); *Countryway P'ship d/b/a Crown Motors* ("*Crown Motors*"), 14-RC-12430, pp.1–2 (2003) (employer argues that all employees in service, body shop, parts and detail departments are all part of the "vehicle repair process."); *Rush Truck Ctrs. of Cal., Inc.*, 31-RC-8102, p. 9 (2002). This is parallel to the position Petitioner takes in the pending case. Pet. Br. 26.

The NLRB regularly rejects this argument and finds distinct units within the service department because the work is distinct. The decisions consis-

tently find "advisors do not perform vehicle maintenance and repairs." *Courtesy Honda*, 12-RC-083701, pp. 35–36. Service advisors are not qualified to perform servicing work. *Phil Long European Imports*, 27-RC-8071, p. 5. And, "ability to perform repair or mechanical work" is not a job requirement for service advisors. *Sexton Ford Sales, Inc.*, 14-RC-068800, p. 7 (2011).

The service advisor is responsible for securing consent from a customer that a recommended additional service or repair should be performed. *See Contemporary Cars, Inc., d/b/a Mercedes-Benz of Orlando* ("*Mercedes-Benz of Orlando*"), 12-RC-9344, p. 17 (2008), *subsequent decisions* 354 N.L.R.B. No. 72 (2009) and 355 N.L.R.B. 592 (2010), *enforced*, 667 F.3d 1364 (11th Cir. 2012). Some states, like California, require a dealership to contact a customer to provide an estimate of costs and receive explicit authorization for a repair before performing any additional work. *See* Cal. Bus. & Prof. Code § 9884.9; *see, e.g.*, Alaska Stat. § 45.45.140; Conn. Gen. Stat. § 14-65f; Del. Code Ann. tit. 6, § 4904A; Fla. Stat. § 559.905; 815 Ill. Comp. Stat. 306/15; Me. Rev. Stat. tit. 29-A, § 1802; Mich. Comp. Laws §§ 257.1307a, .1307e; Minn. Stat. § 325F.58; N.J. Admin. Code § 13:45A-26C.2; N.M. Code R. § 12.2.6.10; N.Y. Comp. Codes R. & Regs. tit. 15, § 82.5; Wash. Rev. Code §§ 46.71.015, .025. Service advisors are trained to comply with these legal obligations.

Service advisors perform no substantive mechanic work. In some dealerships, a service advisor may perform minor service work, like testing a vehicle's battery, replacing a wiper blade or changing a li-

cense plate bulb as a courtesy to a customer. *Acura of Memphis*, 26-RC-8613, pp. 15–16; *N. Bay Saturn Grp., Inc. d/b/a Saturn of Marin* ("*Saturn of Marin*"), 20-RC-17537, p. 5 (1999). Such minor mechanical work "is incidental to their primary duties of greeting customers and preparing the R[epair] O[rder]." *Sexton Ford Sales*, 14-RC-068800, p. 14; *Courtesy Honda*, 12-RC-083701, p. 27. A service advisor would not have the tools or skills to perform more than this incidental work. *Sexton Ford Sales*, 14-RC-068800, p. 7; *State Coll. Ford Lincoln Mercury, Inc.*, 6-RC-12215, p. 7 (2003).

There are important functional reasons why service advisors do not perform vehicle service. First, most are not trained to do the work. *Tinley Park J. Imports, Inc.*, 13-RC-21270, p. 6 (2004). Second, if they were working on a vehicle in a stall, they could not respond to customer inquiries as those stalls are located away from the customer areas and these stalls are assigned to full-time mechanics so there are no available stalls. Third, they would compete with the mechanics for work, an important consideration in flat rate shops where mechanics are paid by the flag hour produced. *See Michael Stead, Inc.*, 32-RC-4789, p. 4 (2000). This would reduce the work available to mechanics and create tension with service advisors who would assign the easy "gravy" work to themselves. Similarly, mechanics do no customer-facing work because it distracts from performing the tasks that generate income for them.

The job duties of service advisors do not include selling either service or vehicles. The primary func-

tion of the job is to serve as the communication link between mechanics and customers. *Howard Orloff Imports, Inc.*, 13-RC-21069, p. 2 (2003). Although there is undoubtedly a sales component, no cases describe the job duties of service advisors with sales as the primary responsibility. In addition, the sales portion of the function has limited discretion. The service advisor does not diagnose a vehicle. *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 16. The service advisor records customer concerns as a guide to the mechanic, who diagnoses the problem to determine precisely what work is needed. Alternatively, the service advisor relies on manufacturer provided maintenance menus or service schedules. *Courtesy Honda*, 12-RC-083701, p. 15; *Thomas Motors of Joliet, Inc.*, 13-RC-21966, p. 2 (2010); *Mercedes-Benz of Pembroke Pines*, 12-RC-9290, pp. 9–10 (2008).

As a result, the service advisor serves a reporting function, conveying to the customer the diagnosis of the mechanic or the recommendation of the manufacturer or dealership for routine scheduled maintenance such as an "oil lube and filter" or tire rotation. A service advisor is not, contrary to Petitioner's argument, a "quintessential sales[person]." Pet. Br. 33 (comparing them to pharmaceutical sales representatives described in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012)).

Many non-exempt employees are paid on a commission basis and, conversely, being paid a commission does not determine the applicability of this overtime exemption. Many service advisors are paid on a draw against commission system, but

that pay plan may include employees from many other classifications who receive a portion of compensation based on either department or dealership-wide performance. This may include dispatchers, detailers, parts drivers, warranty clerks, and bookers with service advisors. *See Mercedes-Benz of Pembroke Pines*, 12-RC-9290, p. 11 (bookers paid on commission); *Tinley Park J. Imports*, 13-RC-21270, p. 6 (detailers paid on flat rate); *Howard Orloff Imports*, 13-RC-21069, p. 4 (dispatchers paid by commission); *Jackson Ford, Inc.*, 7-RC-22545, p. 5 (2003) (lube technicians may receive commission); *Champion Fordland, Inc.*, 4-RC-20177, p. 4 (2001) (warranty clerk earns salary and commissions); *Michael Stead*, 32-RC-4789, p. 3 (parts driver and clerical participate in bonus program). *See also Car City, Inc.*, 116 N.L.R.B. 1571, 1572 (1956) (employer advocating for a unit of all employees, including those in the sales, service and parts departments, as all were entitled to bonuses for securing prospective purchasers of cars and effectively recommending additional needed service and parts).

Similarly, some of the classifications that are usually paid on productivity based systems or on a percentage of sales, may be paid solely on an hourly basis. *See, e.g., Sexton Ford Sales*, 14-RC-068800, p. 9 (some body shop repairmen paid hourly); *Wiers Int'l Trucks*, 25-RC-10389, p. 5 (2007), *subsequent decision* 353 N.L.R.B. 475 (2008) (service technicians, service advisors and parts associates all paid on an hourly basis); *Michael Stead*, 32-RC-4789, p. 3 (service advisors paid hourly with ability to participate in department-wide bonus program).

Additionally, many dealerships have an internal service advisor who only writes repair orders on new cars or used cars that are being readied for sale. *See, e.g., Thomas Motors of Joliet*, 13-RC-21966, p. 3; *Keldeneri Corp.*, JD(SF)-10-07 (2007). They do not have contact with any external customers and do not "sell," as the sole "customer" is the dealership itself. *Mercedes-Benz of Orlando*, 12-RC-9344, p. 16. This position may be hourly. *Azure Auto II, LLC*, 28-RC-160737, p. 3 (2015).

3. Automobile Salesmen are a Separate Appropriate Unit without Inclusion of Service Advisors.

There is a long history of separate units for salesmen in dealerships with both a sales and service department. *See, e.g., Falls Dodge, Inc.*, 171 N.L.R.B. 1580 (1968); *R. James Span*, 189 N.L.R.B. 219 (1971); *Suburban Ford, Inc.*, 248 N.L.R.B. 364 (1980); *Toyota of Walnut Creek, Inc.*, 256 N.L.R.B. 341 (1981); *Winer Motors, Inc.*, 265 N.L.R.B. 1457 (1982); *Lionel G. Sullivan*, 276 N.L.R.B. 999 (1985); *Bridgeway Oldsmobile, Inc.*, 290 N.L.R.B. 824 (1988); *Hayward Dodge, Inc.*, 292 N.L.R.B. 434 (1989); *Southwick Grp.*, 306 N.L.R.B. 893 (1992). There is no history of service advisors being included in a unit of sales department employees.

Larry Faul Oldsmobile Co., 262 N.L.R.B. 370 (1982), addresses the issue of other sales personnel in a dealership. In addition to the automobile salespersons, the dealership also employed finance and insurance salespersons. Like the automobile salespersons, the finance and insurance salespersons received weekly salaries, commissions, monthly bonuses and annual bonuses. *Id.* The Board determined, although they

sold a different product, they were integrated with the automobile salesmen. *Id.* at 371. Also included in the unit were the fleet sales administrator, lease receptionist and the inventory control clerk/receptionist, who was deemed "integral to the selling process." *Id. See also Merry Oldsmobile, Inc.*, 287 N.L.R.B. 847 (1987) (including after sales salespersons in sales unit, excluding other sales department employees).

Other sales department employees have traditionally been afforded the protections provided by FLSA. The sweeping interpretation of the exemption that the Petitioner advocates for based on service advisors being "integral to the servicing process," would also mean that "receptionists" are "integral" to the sales process and porters are "integral to the service process." Pet. Br. 28, 31, and 42. Regardless, the test for application of the exemption is not whether the role of the employee is "integral" to the servicing or selling "process" but rather whether the employee is "primarily engaged" in servicing or selling. The receptionists and porter are not primarily engaged in selling or servicing. Under the Petitioner's expansive interpretation of the exemption, many additional classifications would be swept into the otherwise limited exemption notwithstanding Petitioner's stated position to the contrary. 15-415 Cert. Reply Br. 7, n.2.

C. DEALERSHIPS IN THE 1960s AND EARLIER EMPLOYED MANY POSITIONS IN THE SERVICE AREA IN ADDITION TO THE TWO SPECIFIED EXEMPT POSITIONS.

The Board has considered the job functions of service advisors since the 1940s and 50s. *See B.B.*

Burns Co., 85 N.L.R.B. at 1027; *Hanna Motor Co.*, 94 N.L.R.B. at 107; *Weaver-Beatty Motor Co.*, 112 N.L.R.B. at 62; *Story Oldsmobile, Inc.*, 140 N.L.R.B. at 1051. When Congress was debating the scope of the FLSA exemption, service advisor was already an established and well-known service department position.

Dealerships in the 1960s used multiple job titles when referring to their service department employees, and the job title of service writer/advisor was already in wide-spread use. *See Trevellyan Oldsmobile Co.*, 133 N.L.R.B. 1272 (1961). In *Trevellyan*, mechanics and their helpers were determined to be a separate appropriate unit, and a second, distinct unit of non-mechanic service department employees, including service advisors, lubemen, body repairmen, painters, polishmen, motor riders, countermen and janitors was also found to be appropriate. *Id.* at 1273. The service advisors were explicitly excluded from the ranks of mechanics and included with other, FLSA non-exempt, service department employees.

Other service department employees have been found to be "integral to the servicing process" and performing the "core" goals of the service department, yet are not exempt. In 1949, the Board determined that all of the positions "directly connected with the servicing of automobiles" formed an appropriate unit. *B.B. Burns Co.*, 85 N.L.R.B. at 1026. This included mechanics, body and fender men, grease-rack men, the wash-rack man, the errand boy and the service advisor. *Id.* at 1027. The errand boy (now sometimes a lot jockey, parts runner, etc.) has

been necessary to service operations since at least 1949. These positions are important to mechanics; preventing a loss of time and money under the flat rate system due to time spent performing non-mechanical tasks. *See Gonzalez v. Downtown LA Motors, LP*, 215 Cal.App.4th 36, 41-42 (2013). Thus, these lot jockeys are part of the "core" service function but are not exempt and Petitioner does not assert otherwise.

In a 1965 case, the Board found the classification titles of "service writer, line mechanics, new car get ready and new car detail mechanics, used-car mechanics, body-and-fender men, painters and helpers, parts department men, and lubrication, pickup, and delivery men" to be in use in a single dealership. *See W.R. Shadoff*, 154 N.L.R.B. 992, 993 (1965). Similarly, in 1962, the job titles of service writer, dispatcher, automotive line mechanics, porters, paint and body shop mechanics, new car get-ready, used car make-ready, and parts department were in use. *See Austin Ford, Inc.*, 136 N.L.R.B. 1398, 1399–1400 (1962). This adds to job titles that were already identified in 1950 of lube man, group leaders, wing man, car washers, service station attendant, polishers, and car jockey. *Fuller Auto. Co.*, 88 N.L.R.B. 1452 (1950); *Teague Motor Co.*, 91 N.L.R.B. 1149, 1150 (1950).

As demonstrated above, through the 1960s, classifications beyond mechanics and partsmen "servicing and repairing customers' automobiles" were working in service departments, and similarly, more classifications than just salesmen were "preparing cars for sale to the public" in either service or sales departments. *See W.R. Shadoff*, 154 N.L.R.B. at 994.

The Petitioner's argument that these broad functions define the scope of the FLSA exemption should be rejected. Pet. Br. 28-29; 34. To accept the position would be a return to the 1961-1966 blanket exemption adversely impacting tiremen, car washers, errand boys, polishers, lubemen and the many other classifications that have been identified. *See Adams Motors*, 80 N.L.R.B. 1518 (1948).

The historical use of a variety of job classifications is recorded more than a decade before the 1961 exemption was enacted. In *Fuller Automobile Co.*, 88 N.L.R.B. at 1453, job titles of control clerk, parts panel salesmen, office clerical employees, body shop employees, foremen, service writers, watchman, swing man and car jockeys were identified as part of the servicing organization. If Congress intended to include these individuals into the scope of the overtime exemption, the language of the exemption would have included these well-established separate classifications.

The use of multiple classifications beyond those specified in the FLSA exemption is not limited to the service area. In new car sales, a dealership may employ finance and insurance salesmen in addition to automobile salesmen. *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402, 410 (1982) (excluding finance and insurance salesmen from unit of automobile salesmen), *review denied on unrelated issue, Auto. Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983); *Larry Faul Oldsmobile*, 262 N.L.R.B. 370 (finance and insurance salesmen who are in new car, used car and lease departments included in unit of automobile salesmen); *see also Cutter Dodge*,

Inc., 278 N.L.R.B. 572, 575 (1986) (excluding outside parts salesmen).

The same analysis can be applied outside of automobile dealerships in enterprises subject to the same exemption. In one of the few farm implement dealership cases, the company was engaged in the "retail sale, service, and repair of farm machinery and farm implements." *Missco, Inc.*, 116 N.L.R.B. 1213 (1956). The only job titles sought by the union to be included in an appropriate unit were "mechanics, helpers, assemblers, parts employees, truckdrivers, painters, and janitors." *Id.* at 1214. The employer sought to add the bookkeeper and salesmen. *Id.* There were no service advisors, presumably because the position is not necessary at a facility selling and repairing farm implements. *See also Valley Truck & Tractor Co.*, 80 N.L.R.B. 444 (1948) (finding, at a farm implement service location, an appropriate unit of mechanics, mechanics' helpers, warehousemen, and partsmen, excluding clerical employees, salesmen, and supervisors).

D. EVERY SERVICE DEPARTMENT INCLUDES MANY NON-EXEMPT CLASSIFICATIONS OF EMPLOYEES.

A modern auto dealership's service and parts department includes many classifications in addition to those specifically listed in 29 U.S.C. § 213(b)(10)(A). A review shows the regular usage of at least twenty interrelated and potentially overlapping functions in a well-staffed service department. Only the mechanics and partsmen are included in the FLSA exemption. Dealerships often have other departments,

such as lease departments, fleet sales and used car departments, which encompass additional non-exempt classifications.

1. The Historical Additional Classifications of Service Department Employees.

As early as 1950, multiple job titles in addition to service advisors and mechanics existed and were in regular use in service departments. These titles include the car jockey, lube man (or lubrication man), group leader, painter, wing man, electrician, body and fender man (or body repairman), apprentice, helper, car washer, polisher, service station attendant, porter, underseal man (or undersealer), tire changer, service department cashier, parts department cashier, parts department manager, new car get-ready man, used car reconditioning mechanic, used car cleaner, general utility employee, shag boy, trim man, inventory clerk and shipping clerk. *Fuller Auto. Co.*, 88 N.L.R.B. at 1460; *Teague Motor Co.*, 91 N.L.R.B. at 1150; *Hanna Motor Co.*, 94 N.L.R.B. at 107 n.2; *O.Z. Hall Motors, Inc.*, 94 N.L.R.B. 1180 (1951); *Weaver-Beatty Motor Co.*, 112 N.L.R.B. at 62.

At the time of the enactment and limiting modification to the dealership exemption, the service and parts departments were clearly much broader than mechanics, partsmen, and service advisors.

2. The Modern Classifications of Service Department Employees.

The most common classification inside the service department is a mechanic, more recently referred to as a service technician. *Phil Long European Im-*

ports, 27-RC-8071, p. 3 n.3. The mechanic is a skilled position, and mechanics on their own may form a craft unit. *Courtesy Honda*, 12-RC-083701, pp. 25–26. However, over time, the skills and function of mechanics have changed. Now, most parts are replaced rather than repaired. *Clay Chevrolet, Inc.*, 1-RC-21570, p. 3 (2002). Also, based on the increase in electronic components in vehicles, the most frequently used "tool" for a mechanic includes a diagnostic computer. *Courtesy Honda*, 12-RC-083701, p. 11. Mechanics usually have their own tools and tool boxes, the value of which can exceed $50,000. *Jackson Ford*, 7-RC-22545, p. 4; *Oliver C. Joseph, Inc.*, 14-RC-12830, p. 8 (2011). Mechanics earn certifications from either the manufacturer or the National Institute for Automotive Service Excellence (ASE). *Fletcher Jones*, 300 N.L.R.B. 875; *Performance of Brentwood*, 26-RC-063405, p. 10; *Big Valley Ford*, 32-RC-5370, p. 6; *Saturn of Marin*, 20-RC-17537, p. 6. No one else in the dealership does the work of the mechanic, and the mechanic does not do the work of any other classification. *Fairfield Ford*, 9-RC-17713, p. 3 (2002), *subsequent decision* 340 N.L.R.B. No. 9 (2003), *review denied, enforced*, 116 F. App'x 601 (6th Cir. 2004). This makes sense because of the skill sets involved and the higher wages of mechanics.

In addition to highly-trained mechanics, there are likely to be lesser skilled technicians known as lubricators, lube technicians, express techs, or lube and oil technicians. Their work is frequently limited to oil and other fluid changes, changing belts or filters, rotating tires or other simple servicing work. *Fletcher Jones*, 300 N.L.R.B. at 876; *Courtesy Hon-*

da, 12-RC-083701, p. 14; *Arbogast*, 9-RC-17854, p. 3. Lube technicians are generally paid on an hourly basis and are not exempt from overtime. *Fletcher Jones*, 300 N.L.R.B. at 876; *Junction Buick Pontiac GMC-Truck*, 8-RC-16059, p. 4 (2000). These employees are often employed in "quick lane" or "quick service" areas, geographically separate from the rest of the service department. *Academy LLC*, 27-RC-8320, p. 4 (2004).

There may also be pre-delivery inspection technicians who do not perform mechanical work but simply inspect and prepare new vehicles for customers to pick up. *Royal Gate Dodge, Inc.*, 14-RC-12420, pp. 6–7 (2003). This position is sometimes referred to as a "get ready technician" or "new car cleanup employee" or "internal technician." *Fletcher Jones*, 300 N.L.R.B. at 876; *Dick Bullis, Inc.*, 176 N.L.R.B. 158, 158 (1969); *Performance of Brentwood*, 26-RC-063405, p. 23; *Arbogast*, 9-RC-17854, p. 4; *Acura of Memphis*, 26-RC-8613, p. 13.

The pre-delivery inspection work may also be performed by a "detailer." *Tinley Park J. Imports*, 13-RC-21270, p. 6. But a detailer may also refer to an individual who provides a deep clean and wash to a vehicle and repairs minor paint scratches for either existing customers or in preparation for selling a pre-owned vehicle. *Performance of Brentwood*, 26-RC-063405, p. 19; *Mercedes-Benz of Orlando*, 12-RC-9344, p. 14; *Saturn of Marin*, 20-RC-17537, p. 4. Detailers are paid on an hourly basis. *Oliver C. Joseph*, 14-RC-12830, p. 12; *Saturn of Marin*, 20-RC-17537, p. 7. There may also be a car washer or wash rack employee who washes cars that have been serviced

before the vehicle is returned to the customer. *Sexton Ford Sales*, 14-RC-068800, p. 8.

Some dealerships will have a dispatcher who keeps track of the work and assigns the work to the mechanics by evaluating the nature of the work, the skills of the mechanics and availability. *Fairfield Ford*, 9-RC-17713, p. 4. *See also Austin Ford*, 136 N.L.R.B. at 1399. In older parlance, they were known as "towermen," inherited from other settings where some sat in a tower to monitor the flow of work. *See Dick Bullis*, 176 N.L.R.B. at 158. Other dealerships may call this position a "workflow coordinator." *Performance of Brentwood*, 26-RC-063405, p. 26. This individual may have no mechanical certifications but may earn commission off of the total labor sold in the service department. *Sexton Ford Sales*, 14-RC-068800, p. 8. In some dealerships, the service advisors may serve this function. *Sacramento Auto. Ass'n, Valley Motor Car Dealers Council*, 193 N.L.R.B. 745, 746 (1971); *Q&S Auto., LLC*, 32-RC-5403, p. 10 (2006).

A dealership may also employ a quality control person. This person reviews repaired vehicles but does not usually perform repair work. *Fletcher Jones*, 300 N.L.R.B. at 875. This individual can be paid hourly and receive overtime. *Life Quality Motor Sales, Inc.*, 29-RC-9173, pp. 26–28 (1999).

Some dealerships employ an appointment taker/scheduler. *Courtesy Honda*, 12-RC-083701, p. 17; *Mercedes-Benz of Orlando*, 12-RC-9344, p. 5; *Life Quality Motor Sales*, 29-RC-9173, p. 11.

A service department will have clerks and/or cashiers. The cashiers accept payment from custom-

ers and may file documents and/or pick up phones for the service department. *Phil Long European Imports*, 27-RC-8071, p. 2 n.2; *Arbogast*, 9-RC-17854, p. 4. Clerks or administrators process paperwork associated with repairs, including warranty payments from manufacturers. *Arbogast*, 9-RC-17854, p. 4; *Courtesy Honda*, 12-RC-083701, p. 2. Each is generally an hourly, non-exempt position but at some dealerships may be salaried. *Acura of Memphis*, 26-RC-8613, pp. 17–18 (hourly); *Crown Motors*, 14-RC-12430, p. 6 (same); *Life Quality Motor Sales*, 29-RC-9173, pp. 29–31 (same); *but see Fairfield Ford*, 9-RC-17713, p. 3 (salaried).

There may be a "booker" who "books" or closes repair orders and ensures that technicians are properly paid under the flat rate pay system. *See Mercedes-Benz of Orlando*, 12-RC-9344, pp. 7, 20. This job may be referred to as a "flagger" in reference to the flat rate hours "flagged" by a mechanic. *Sexton Ford Sales*, 14-RC-068800, p. 8.

There are also porters, lot porters, valets, or car jockeys. *Pflueger Auto Grp., LLC*, 37-RC-4120, p. 7 (2005) (service lot technicians); *Arbogast*, 9-RC-17854, p. 3. Their main function is to move vehicles either from the customer service entrance of the dealership to a mechanic's stall or a lot, or from the lot to a stall or back to the customer. These employees also help to maintain cleanliness in the service area. *Academy LLC*, 27-RC-8320, p. 10. A porter may also top off fluids, such as windshield wiper fluid or anti-freeze. *Courtesy Honda*, 12-RC-083701, p. 6. They are paid on an hourly basis and are eligible for overtime. *BMW of W. Springfield*, 1-RC-21908, p. 7; *Junc-*

tion Buick Pontiac GMC-Truck, 8-RC-16059, p. 4; *Acura of Memphis*, 26-RC-8613, p. 17; *Life Quality Motor Sales*, 29-RC-9173, pp. 10–11.

The dealership may also employ a "shuttle driver" or "courtesy driver" who is responsible for transporting customers to and from the facility. *Courtesy Honda*, 12-RC-083701, p. 2; *see Mercedes-Benz of Orlando*, 12-RC-9344, p. 22; *Mercedes-Benz of Pembroke Pines*, 12-RC-9290, p. 11. In a large dealership, there may also be a service greeter who directs customers to the appropriate service advisor. *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 5.

Although mechanics are generally required to keep their own work areas clean, most dealerships either employ janitorial staff or contract with an outside agency to provide on-going cleaning services. The janitor is usually placed within the service department even if her duties extend into the sales areas. *See Country Ford Trucks, Inc.*, 32-RC-4617, p. 3 (1999), *subsequent decision* 330 N.L.R.B. 328 (1999), *review denied*, 229 F.3d 1184 (D.C. Cir. 2000). This job is hourly and non-exempt. In some dealerships, the individual performing this work may be called a maintenance employee, and the job may also include facilities or equipment maintenance. *Frank Buck Motors*, 4-RD-2121, p. 4 (2007).

In short, even in 1949, the service department could include many non-mechanics, non-service advisors who were directly related to the service process. *B.B. Burns Co.*, 85 N.L.R.B. at 1027. As the progression of these classifications is reflected in NLRB decisions, the same is true fifty years after the Congressional elimination of the exemption for auto-

mobile dealers and the creation of the limited exemptions in 1966. *See Worthington Chevrolet, Inc.*, 271 N.L.R.B. 365 (1984) (including in the mechanical sub-department of the service department service advisors, dispatchers, mechanics, cashiers, warranty clerks and lot persons).

3. Historical Classifications in the Parts Department.

The parts department generally includes more than just partsmen, and the work of partsmen is an evolving hybrid between sales and service.

Some partsmen performed traditional mechanic functions. They could "dismantle engines and transmissions to obtain needed parts, fabricate and improvise parts, and assist mechanics in adjusting substitutes for unavailable standard automobile parts." *Austin Ford*, 136 N.L.R.B. at 1400.

Historically, although not presently, some partsmen came from the ranks of the mechanics. *See, e.g., Harrys Cadillac-Pontiac Co.*, 81 N.L.R.B. 1, 4 (1949) ("It is not uncommon for a mechanic to become a parts man, as 'a good parts man is also a good mechanic.'"). As parts have become standardized with UPC codes, the necessary skills of a partsman have become diminished, and there is minimal interchange between the positions of partsman and mechanic. *See, e.g., Michael Stead*, 32-RC-4789, p. 4; *Courtesy Honda*, 12-RC-083701, p. 23.

Traditionally, a larger parts department includes more than just partsmen. As early as 1956, a parts department could include parts pickers, inventory

employees, countermen, stock control clerks, and parts office clerical employees. *Herman M. Brown Serv. Co.*, 115 N.L.R.B. 1371, 1373 (1956).

Thus, at the time the FLSA exemption was changed, the parts department was more than just partsmen, but a choice was made by Congress to limit the exemption to only the partsmen.

4. Modern Classifications in the Parts Department.

The service department may or may not include the parts department, which may be its own standalone department. The modern parts department is generally staffed by partsmen who may be called a retail or wholesale parts counter employee or a parts advisor. *Courtesy Honda*, 12-RC-083701, p. 2; *Phil Long European Imports*, 27-RC-8071, p. 7. A partsman generally works at the back counter, which opens to the shop where the mechanics work, or the front counter, which opens into the dealership to an area where customers may purchase accessories or parts. *Michael Stead*, 32-RC-4789, pp. 2–3. These individuals take part orders from mechanics, members of the public or outside companies (including body shops and independent repair shops) and provide the parts. *Courtesy Honda*, 12-RC-083701, p. 20. There may be a third counter specific to the body shop. *Hall Chevrolet*, 5-RC-126386, p. 14 (2014). Historically, some partsmen had mechanical responsibilities in repairing parts, but recent unit determination decisions do not reference any mechanical tasks associated with the job probably because of the "remove and replace" repair process. *Compare Austin*

Ford, 136 N.L.R.B. at 1400, *with Courtesy Honda*, 12-RC-083701, pp. 19–20.

In a larger parts department, there are other employees in addition to traditional partsmen. The stocker, stockroom clerk, or shipping and receiving employee confirms receipt of ordered parts or accessories, stores incoming parts and re-packages used parts for recycling, return to the manufacturer or other disposal. *See Arbogast*, 9-RC-17854, p. 4; *Michael Stead*, 32-RC-4789, pp. 2–3. These individuals may also be called warehouse employees. *Frank Buck Motors*, 4-RD-2121, p. 5. This is generally an hourly paid position. *Pflueger Auto Grp.*, 37-RC-4120, p. 11; *Life Quality Motor Sales*, 29-RC-9173, p. 8.

The parts driver may pick up a needed part from an offsite warehouse maintained by the employer, another dealership or a parts retailer. Similarly, the driver may deliver parts to another dealer or repair shop for sale. *Courtesy Honda*, 12-RC-083701, p. 21; *see also Gregory Chevrolet, Inc.*, 258 N.L.R.B. 233 (1981). This is an hourly position. Some dealerships employ a parts runner who delivers parts inside the shop from the partsman to the mechanic. *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 7.

Some dealerships employ an administrative assistant, cashier or clerical dedicated to the parts department. *See, e.g.*, *Michael Stead*, 32-RC-4789, p. 3. There may be a parts warranty clerk. *Payton-Wright Ford, Inc.*, 16-RC-10539, p. 7 (2003). The parts driver, runner, clerk and administrative assistant are hourly, non-exempt positions. *Michael Stead*, 32-RC-4789, p. 3; *Azure Auto II*, 28-RC-160737, p. 3; *Sexton Ford*

Sales, 14-RC-068800, p. 11; *Pfleuger Auto Grp.*, 37-RC-4120, p. 11.

5. Classifications in the Body Shop.

Some dealerships operate a body shop or collision center as part of the service department. A body shop, generally in a separate area, is used for painting, frame adjustment, and repairs. *Arbogast*, 9-RC-17854, p. 6; *Payton-Wright Ford*, 16-RC-10539, p. 1. Employees of the body shop repair vehicles but do not service vehicles within the terms of the FLSA exemption.

Body shop technicians will do collision and paint repair work. They straighten metal, utilize body filler and grinders to repair damage, smooth and sand repaired areas, and match paint. These employees may be paid on a flat rate basis or receive hourly pay. *Arbogast*, 9-RC-17854, p. 6 (flat rate pay); *Life Quality Motor Sales*, 29-RC-9173, p. 6 (hourly pay). This is a different skill set and craft from the automotive mechanic. *Big Valley Ford*, 32-RC-5370, p. 13.

The body shop may include an automotive painter to re-paint those sections of the vehicle that have been repaired. *Sexton Ford Sales*, 14-RC-068800, p. 10. This position may be paid based on revenue produced. *Id.*; *Arbogast*, 9-RC-17854, p. 7. It could also be paid as an hourly wage with an incentive for work produced. *Royal Gate Dodge*, 14-RC-12420, p. 10. The painter may have an hourly paid assistant or helper. *Sexton Ford Sales*, 14-RC-068800, p. 11.

The body shop may employ a detailer who cleans, washes, waxes and buffs cars but does not perform

body work. *Life Quality Motor Sales*, 29-RC-9173, p. 7. This detailer would be separate from the service department detailer or car washer. *Bradley Chevrolet, Inc.*, 25-RC-10146, pp. 5, 6 (2002).

Automobile dealer body shops have an "estimator" who performs some of the functions of a service advisor. *Payton-Wright Ford*, 16-RC-10539, p. 3. The estimator provides an estimate on the cost of body repair and the expected date of returning a car to a customer. *Hall Chevrolet, LLC*, 5-RC-126386, p. 12. Frequently, these estimates are prepared for insurance companies who must authorize the repairs. *Royal Gate Dodge*, 14-RC-12420, p. 9. There is a limited sales function in preparing estimates.

There may be a separate porter and secretary designated for the body shop department. *Crown Motors*, 14-RC-12430, p. 6. Both of these are hourly positions. *Id.* at p. 7.

E. THE DIVERSITY OF JOB FUNCTIONS IN A DEALERSHIP SUPPORTS A LIMITED AND NARROW READING OF THE OVERTIME EXEMPTION.

Because of the diversity of functions of other classifications employed in a dealership, the exemption should be read as written, including only the specified classifications of mechanic and partsmen, which are constant across dealerships. The Petitioner would exclude many classifications from the FLSA protections they have enjoyed since Congress eliminated the wholesale exemption from auto dealers in 1966.

The justification provided to exempt partsmen and mechanics from the FLSA overtime requirements arises from the potential for on-call work to be performed at irregular or seasonal hours at the site of a disabled vehicle including trucks and farm implements. *See* 15-415 Resp. Br. 32–35. This is particularly reflected in the legislative history connected to partsmen and their role in maintaining farm implements. This rationale could not be applied to service advisors or any other classifications of employees in a service department. Nonetheless, the Petitioner argues that service advisors should be read into the statute based on either their functional integration in the servicing of vehicles or their work selling the servicing of vehicles. Pet. Br. 34.

A typical dealership employs a multitude of exempt and non-exempt employees in the service department. *See UAG-Stevens Creek II, Inc.*, 32-RC-108320, p. 4 (2013); *Courtesy Honda*, 12-RC-083701, pp. 1–2; *Payton-Wright Ford*, 16-RC-10539, p. 1. Each is integrated into the servicing of customers and their vehicles.

The examples, which include more than twenty distinct classifications within dealerships, demonstrate the error of expanding the exemption of 29 U.S.C. § 213(b)(10)(A) to include classifications beyond salesman, partsman and mechanic. They also demonstrate that all these other classifications existed in 1966 through 1974 and Congress declined twice to include them in the exemption. Given the scope of job duties and job titles that exist in dealerships described in the NLRB cases, a narrow reading of the exemption is more consistent with the industry.

IV. CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully Submitted,

DAVID A. ROSENFELD
Counsel of Record
CAREN P. SENCER
WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
courtnotices@unioncounsel.net
drosenfeld@unioncounsel.net
csencer@unioncounsel.net
Telephone (510) 337-1001

Counsel for Amicus Curiae